IN THE EMPLOYMENT RELATIONS COURT
AT LAUTOKA
APPELLATE JURISDICTION

ERCA No. 03 of 2020

BETWEEN : **MILLENNIUM JOINERY FINISHING WORKS PTE LIMITED**

APPELLANT

AND : **SHIVNESH KUMAR**

RESPONDENT

BEFORE : M. Javed Mansoor, J

COUNSEL : Ms. S. Sandiya for the Appellant

Ms. L. Waqabaca for the Respondent

Date of Hearing : 25 August 2022

Date of Judgment : 4 December 2023

JUDGMENT

EMPLOYMENT LAW Appeal – Summary dismissal – Dismissal held to be unjust – Reversal of findings of fact – Section 33 of the Employment Relations Act 2007

The following cases are referred to in this judgment:

a. Thomas v Fiji Electricity Authority [2004] FJHC 303

b. Benmax v Austin Motor Company Limited [1955] 1 ALL ER 326

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1. This is an appeal against the decision of the resident magistrate given on 28 February 2020, whereby he held that the respondent's dismissal from employment was unjust. The tribunal noted that the worker was employed for 10 months and awarded the equivalent of six months wages amounting to $12,500.00 together with costs. The resident magistrate dismissed the claim of unfair termination.

2. The respondent was employed by the appellant on January 2018 until November 2018 as an information technology officer. He managed the appellant's finance, human resource and information technology functions. His employment was summarily terminated for "threatening to close down the company and committing forgery".

3. At the tribunal hearing, a company director, Ashneel Prakash, gave evidence for the employer while the respondent gave evidence on his behalf.

4. The appellant's evidence was that the respondent sent a text message to the project manager, Rajneeth Nath, saying that he would close down the company and put people in prison. Following this, Mr. Prakash, held a meeting with the respondent on 10 November 2018 – a Saturday – along with the project manager Rajneeth Nath and others in management.

5. At this meeting, Mr. Prakash said, the respondent was requested to resign from employment. When he refused to do so, the company director asked him to collect the termination letter on Monday. He said the worker never collected the letter. He alleged that the worker was uncooperative in providing necessary

information, and that he had received a complaint on this from the project manager.

6. The respondent told the tribunal that the appellant's project manager was involved in tax invasion and bribery, and that he sent a text message to him that he proposed to take action against the employer. He sent the message after the project manager had complained about him to the director. He denied being uncooperative in furnishing information which was necessary for the company's business. He states he was dismissed as a result of sending the message. He denied receiving the dismissal letter.

7. The tribunal held against the appellant. The resident magistrate stated that an employer must act as a fair and reasonable employer would in all the circumstances in terminating the employment of a workman for misconduct. He referred to the decision in *Thomas v Fiji Electricity Authority*[1]. The resident magistrate says that the employer produced evidence concerning only the allegation of the threat to close down the company.

8. In reaching his conclusion, the resident magistrate observed that the employer is not required to hold a formal disciplinary hearing where allegations are put in writing and witnesses are cross-examined. However, the determination states, the employer is expected to conduct a reasonable investigation into the incident which in this instance would include recording a statement from the complainant Rajneeth Nath, and affording the respondent an opportunity to explain his actions before terminating his employment. He held that the failure on the part of the employer to afford such an opportunity constituted a serious breach of rules of natural justice and due process.

9. The tribunal held that the employer failed to issue a termination letter to the respondent at the time of dismissal. The determination stated that the respondent's service was terminated on 10 November 2018 by asking him to return the company laptop and leave the office. The tribunal concluded that the employer failed to adhere to section 33(2) of the Act, which imposes a mandatory obligation on the employer to provide the worker with reasons in writing at the

[1] [2004] FJHC 303

time of dismissal. The tribunal noted that no evidence was presented concerning the allegation of forgery.

10. The tribunal stated:

> "A worker could be summarily dismissed from service if his misconduct was of such a grave and weighty character as to undermine the relationship of trust and confidence which is central to the employer-employee relationship".

11. In the first instance, the appellant sought leave for extension of time to file the appeal. The respondent consented to granting time to file the appeal. The appellant raised 12 grounds of appeal, saying that the resident magistrate erred in making an order against the appellant. The grounds mainly concern findings of fact made by the resident magistrate.

12. At the hearing of the appeal, the appellant submitted that issuing threats to a fellow employee amounts to gross misconduct warranting termination of employment. The respondent submitted that the appellant had only produced the text message sent by him to the project manager, but did not afford him an opportunity to explain his actions.

13. Section 33(1) of the Employment Relations Act provides for summary dismissal of a worker for gross misconduct. Nevertheless, the resident magistrate has proceeded on the basis that the respondent's threat was not sufficiently serious to warrant dismissal.

14. The tribunal reasoned there was room for the employer to have intervened and settled the differences between the workman and the project manager, and examine the cause of the respondent's conduct.

15. While it is not always necessary for an employee to be heard prior to dismissal, the resident magistrate has concluded that hearing the worker would have been appropriate in the circumstances of the dispute. He has reached this conclusion after hearing the parties.

16. The matters complained of by the appellant concern the tribunal's factual findings. The resident magistrate has considered the evidence in the context of the dispute that arose between the respondent and the project manager. Having heard the evidence, he was in the most advantageous position to make findings and draw inferences on those findings in reaching a conclusion.

17. A court sitting in appeal will be slow to differ from primary findings of fact reached at first instance. The authorities say a court of first instance should have been plainly wrong in its findings of fact in order for an appellate court to intervene and reverse those findings.

18. In *Benmax v Austin Motor Company Limited*[2], the House of Lords stated:

> Apart from cases where appeal is expressly limited to question to law, an appellant is entitled to appeal against any finding of the trial judge, whether it be a finding of law, a finding of fact or a finding involving both law and fact. But the trial judge has seen and heard the witnesses, whereas the appeal court is denied that advantage and only has before it a written transcript of their evidence. No one would seek to minimize the advantage enjoyed by the trial judge in determining any question whether a witness is, or is not, trying to tell what he believes to be the truth, and it is only in rare cases that an appeal court could be satisfied that the trial has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that. The trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is, and should be, slow to reverse any finding which appears to be based on any such considerations.

19. The grounds raised in appeal concern the tribunal's findings of fact. The submissions have not shown that these findings are without basis. The appeal cannot, therefore, succeed.

[2] [1955] AER 326 at 328/ 329

20. The court notes that the respondent was in employment for approximately 10 months. Taking the overall circumstances into account, the court holds that it would be appropriate to reduce the compensation awarded to the respondent to $8,000.00.

ORDER

A. The appeal is dismissed.

B. The compensation awarded by the tribunal is varied to $8.000.00.

C. The parties will bear their own costs in this proceeding.

Delivered at **Suva** *via skype* on this **4th** day of **December, 2023.**

M. Javed Mansoor
Judge